UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN CIVIL LIBERTIES UNION OF Michigan, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Civil No. 2:11-cv-13154

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The FBI is the "primary investigative agency of the federal government." FBI, Domestic Investigation and Operations Guide, Oct. 15, 2011 ("2011 DIOG"), at 29.[1] It is charged with "investigat[ing] all violations of federal law that are not exclusively assigned to another federal agency." *Id.* It is also tasked with taking the "lead domestic role in investigating international terrorist threats to the United States, and in conducting counterintelligence activities to counter foreign entities' espionage and intelligence efforts." *Id.* Armed with years of expertise accumulated in performing these roles, the FBI has concluded that releasing the information sought by plaintiff in this Freedom of Information Act ("FOIA") case could jeopardize ongoing criminal investigations, cause serious damage to the United States' national security and foreign relations, and facilitate the circumvention of federal law. Nonetheless, plaintiff – the ACLU of Michigan – insists that it is entitled to this information. It is not; not only does the Court lack jurisdiction over this suit because plaintiff failed to exhaust its administrative remedies, but the information sought is protected from disclosure by FOIA exemptions 1, 7A, and 7E. Plaintiff also asserts that defendants have failed to demonstrate that the FBI conducted a reasonable search, but the FBI's 99-page declaration and 8-page supplemental declaration demonstrate otherwise. For the reasons discussed below, the Court should dismiss plaintiff's complaint for lack of subject matter jurisdiction or enter judgment in favor of defendants.

ARGUMENT

I. The Court Lacks Jurisdiction Because Plaintiff Failed to Exhaust Its Administrative Remedies.

Plaintiff has failed to exhaust its administrative remedies, so its suit should be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(h)(3). Exhaustion is required if an agency responds to a FOIA request before a suit is filed because Congress "did not mean for the court to take over the agency's decisionmaking role in midstream

[1] The DIOG is available online at: http://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2011-version.

or to interrupt the agency's appeal process when the agency has already invested time, resources, and expertise into the effort of responding." *Ogelsby v.U.S. Dep't of Army*, 920 F.2d 57, 64 (D.C. Cir. 1990); *Percy Squire Co., LLC v. FCC*, 2009 WL 2448011, at *4 (S.D. Ohio Aug. 7, 2009). The failure to exhaust administrative remedies deprives the Court of subject matter jurisdiction. *Reisman v. Bullard*, 14 F. App'x. 377, 379 (6th Cir.2001) (unpublished); *Percy Squire Co.*, 2009 WL 2448011, at *5.

The FBI responded to plaintiff's request before plaintiff filed suit: It sent several letters indicating that it was processing plaintiff's request, and it produced 298 pages of documents to plaintiff on December 22, 2010, which was 7 months before plaintiff filed suit. Complaint for Injunctive Relief, July 21, 2011, Doc. No. 1, ¶ 34. This response sufficed to require exhaustion. The courts in *Percy Squire*, 2009 WL 2448011, at *5 and *CREW v. FEC*, 2011 WL 6880679, at *7 (D.D.C. Dec. 30, 2011), concluded that agreements to produce documents constituted responses adequate to trigger the exhaustion requirement. Thus, the actual production of documents necessarily suffices to require exhaustion by plaintiff. And plaintiff did not exhaust it administrative remedies. It sent the FBI an appeal letter complaining about aspects of the initial document release (*i.e.*, the release of the 298 pages), but it filed suit before its appeal was decided, and, in any case, it did not appeal the FBI's search. *See* Decl. of Mark Fancher, Attorney, ACLU, April 10, 2012, ¶¶ 8-13 (attached as Exhibit 2 to Memo. in Support of Pl.'s Cross-Mtn. for Partial Summ. Judg. and Opp. to Defs.' Mtn. for Summ. Judg. ("Opp."), April 10, 2012, Doc. 24). Accordingly, Plaintiff has failed to exhaust its administrative remedies and its suit should be dismissed for lack of jurisdiction.

II. Defendants Adequately Described and Performed Their Search.

A. The Search Description Was Reasonably Detailed.

To satisfy the FOIA, the government must give reasonable detail of the scope of its search. *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 548 (6th Cir. 2001). Defendants met that standard here. The search description takes up 9 pages of the FBI's initial declaration. *See* Decl. of David M. Hardy, Section Chief of the Record/Information Dissemination Section

("Records Section") of the Records Management Division, FBI, Feb. 17, 2012 ("Firs Hardy Decl.") (attached to SJ. Brief as Ex. 1), and has been supplemented with another declaration, Second Declaration of David M. Hardy, May 24, 2012 ("Second Hardy Decl."), ¶¶ 7-8 (attached).[2] The declarations describe the search of (i) the FBI's Central Records System, (ii) five components of the FBI headquarters (the Office of Public Affairs ["OPA"], the Office of Congressional Affairs ["OCA"], the Corporate Policy Office ["CPO"], the Directorate of Intelligence ["DI"], and the Office of General Counsel ["OGC"]), and (iii) the FBI field office in Detroit. First Hardy Decl. ¶¶ 23-38, Second Hardy Decl. ¶¶ 4-10. The First Hardy Declaration explains why those offices were searched and describes the detailed search instructions distributed by the Records Section. First Hardy Decl. ¶¶ 23-38. For example, the Records Section instructed offices to search, if necessary, "[a]ll records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, faxes, files, guidance, evaluations, instructions, analysis, memoranda, agreements, notes, rules, technical manuals, technical specifications, training manuals or studies." *Id.*¶ 32.

Plaintiff nonetheless argues that the FBI did not adequately describe its search because it not did describe what databases were searched or how. Opp. at 11. Not so. Take the headquarters' offices. The Records Section provided a detailed description of the search that was to be conducted. It not only provided directions about the kinds of records that should be

[2] In the course of the reviewing the search history to ensure the precision of this brief, defendants recently discovered that one component may not have conducted the initial search, and that another component may have mis-transmitted the information that it found after conducting its search. Second Hardy Decl., ¶¶ 7-8 (attached). But those components have since conducted (or re-conducted) the search described in the First Hardy Declaration and, as a result, have released 23 pages of records in full and 5 pages of records with minor redactions. The redactions comprise a phone number, which was redacted for privacy purposes under Exemptions 6 and 7(c), *see* Second Hardy Decl. ¶ 12, First Hardy Decl., ¶¶ 64-66, and redactions about law enforcement techniques that track redactions taken and justified in previously disclosed documents, specifically: information regarding when law enforcement techniques may be used, Second Hardy Decl. ¶¶ 12-14, First Hardy Decl. ¶¶ 88, 90, 91, information on the limitations of law enforcement techniques, Second Hardy Decl. ¶¶ 12-14, First Hardy Decl. ¶ 91, and information on the use of sources as an investigative tool, Second Hardy Decl. ¶¶ 12-14, First Hardy Decl. ¶ 82.

searched, if necessary (as mentioned in the preceding paragraph), but it also told them how to search – "review database systems as well as paper or manual files" and "submit an all employee e-mail throughout your division for all relevant records pertaining to this request," First Hardy Decl. ¶ 29 – and even how not to search – "a thorough search of the . . . Central Records System [has been completed]; therefore receiving offices are not required to search Automated Case Support," *Id.* ¶ 31. And the headquarters' offices have "conduct[ed] the [ ] described search." *Id.* ¶ 34; Second Hardy Decl. ¶¶ 4-10. With respect to the field office, the Record Section coordinating the search gave it the same detailed directions regarding the search. *Id.* ¶ 35[3]. The Records Section provided further directions to the field office regard the kinds of records to be searched – such as records describing "[f]ocused behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community," *id.*(quotation marks omitted) – and even where responsive records are most likely to be found, *id.* ¶ 37 (noting that "most responsive documents will be found within Field Office Intelligence Groups [ ]/Directorate of Intelligence . . ."). The Detroit field office took these detailed directions and "conducted a diligent search of intelligence products and maps meeting the guidelines provided"; it sent an "office-wide email canvass for the requested material" and spent 8 person hours conducting the search and reviewing material for responsiveness. *Id.* ¶ 38.

The detail contained in these declarations easily surpasses the reasonably detailed description standard applied by the courts. In *Rugiero,* the Sixth Circuit upheld a search by the Department of Justice Tax Division in which it stated simply that it "searched its 'indices'" and that its files are organized by the name of the subject of the investigation. 257 F.3d at 548. Mr. Hardy's declaration provides much greater detail about the scope of the search and how it was conducted.

[3] Paragraph 35 of the First Hardy Declaration states that "the Detroit Office was provided with the same detailed request for records as the Headquarters division, [which is described] in paragraphs 28-31." The citation to paragraphs 28-31 is a typographical error; it should read "paragraphs 29-32," as is evident from the substance of the paragraphs.

B. Defendants Performed a Reasonable Search.

Plaintiff also argues that defendants' search was substantively inadequate. Opp. at 12-13. It contends that the field office's search was unlikely to locate legal and policy documents, because the office searched "intelligence products and maps," First Hardy Decl. ¶ 38. Opp. at 12. And plaintiff argues that the field office's search was unlikely to uncover Domain Management Files because "the Hardy Declaration provides no indication whether or how the field office searched these filed, whether in paper or electronic form." Opp. at 13.

The FOIA requires an agency to conduct "a search for the requested record using methods reasonably expected to produce the requested information." *Rugiero*, 257 F.3d at 547. Courts focus on "the agency's search, not on whether additional documents exist that might satisfy the request." *Id.* That is, "a search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request." *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). "In the absence of countervailing evidence or apparent inconsistency of proof [the agency's affidavit] will suffice to demonstrate compliance with the obligations imposed by the FOIA." *Rugiero*, 257 F.3d at 547 (internal quotation marks omitted).

The agency searched for legal and policy documents where they would likely be found – at headquarters, in OPA, OCA, CPO, DI and OGC. These are offices that have a role in creating, coordinating, or conveying policy decisions (OPA, OCA, CPO, and DI) or legal decisions (OGC). For example, the FBI searched for policy documents in, among other places, the Corporate Policy Office, which "manages the coordination, review, approval and publication process [for FBI policies] to bring order and clarity to FBI policy and procedure. This office was the most logical location to search for policy and guidance documents within the FBI." First Hardy Decl. ¶ 26. And the FBI searched for legal documents in, among other places, the Office of the General Counsel, which provides legal "advice to the Director, other FBI officials and divisions, and field offices on all aspects of law." *Id.* ¶ 28. This was reasonable. That the field office *may* have a few copies of such documents does not mean that the FBI was obligated to

search there, given that it searched these headquarters offices. In *Rugiero*, the Court upheld the Department of Justice's Tax Division's search, even though it searched only for documents in which the requester was the subject of an investigation, notwithstanding that the request was not so limited. 257 F.3d at 548-49. The search here was even more thorough than in *Rugiero*, because the agency did not neglect a category of records, but rather reasonably chose to tailor its search.

Plaintiff's second argument regarding the substance of the search – *i.e.*, that the agency did not describe its search for domain management documents in the field office – reads like a complaint about the description of the search, not its substance. If it is a challenge to the description of the FBI's search, the challenge fails because the agency explained that the field office searched intelligence files, and this is where domain management documents would be expected to be found. First Hardy Decl. ¶ 38, pp. 24-25 n.10. Indeed, the Second Hardy Declaration confirms that field office searched the 800 series files where domain management documents are located. Second Hardy Decl. ¶ 4. If this is a challenge to the substance of the search, then it fails because the FBI searched where domain management documents would be expected to be found – not only the Detroit field office, but also the OPA, OCA, CPO, and DI. Indeed, the FBI focused its search of the DI on the "Domain and Collection Program Management Unit within the DI because this is the most logical location for any policy and guidance type of materials concerning the collection of racial and ethnic data . . . and any related items." *Id.* ¶ 27.

III. Defendants Disclosed As Much Information As Possible Without Revealing Exempt Information.

Plaintiff raises a number of objections to defendants' segregation and disclosure decisions, *i.e.*, their decisions about what information in documents may be released and what information must be withheld under one of the FOIA's exemptions.[4] None has merit.[5]

[4] Plaintiff does not challenge defendants' invocation of Exemptions 6, 7C, or 7D. Opp. at 14-15 n.14. And plaintiff challenges defendants' invocation of Exemption 7E only with respect to the DIOG-related training materials. *Id.*

A. Defendants Appropriately Justified Their Segregability Decisions.

Plaintiffs maintain that defendants "do not provide the required factual support for their segregability determinations" with respect to the documents that they have withheld under FOIA Exemptions 1 and 7A.[6] Opp. at 15. Exemption 1 permits the government to withhold from disclosure under the FOIA documents that must be "kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). And Exemption 7A authorizes the withholding of information "compiled for law enforcement purposes" whose release "could be reasonably expected to interfere with enforcement proceedings." *Id.* § 552(b)(7)(A).

The FOIA provides that "any reasonably segregable portion of a record shall be provided after deletion of the portions which are exempt." *Id.* § 552(b). Interpreting this phrase, the Sixth Circuit has concluded that "the words 'reasonably segregable' must be given a reasonable interpretation, *particularly where information or records compiled for law enforcement purposes are concerned*." *Dickerson v. Dep't of Justice*, 992 F.2d 1426, 1434 (6th Cir. 1993) (emphasis added). Thus, the Court in *Dickerson* concluded that given the context – namely, that the records sought pertained to the ongoing criminal investigation into the disappearance of labor union official Jimmy Hoffa – "the prospects for finding any 'reasonably segregable' non-public portions of the Hoffa files that could properly be made public are [not] such as to justify the remand." *Id.* The files would have to have been redacted to such an extent as to render them

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[5] Plaintiff asks the Court to conduct an *in camera* review of certain documents, if it does not order their disclosure. Opp. at 17, 29. Courts, however, disfavor *in camera* reviews because "they are burdensome [on the courts] and are conducted without the benefit of [ ] adversary[ial] proceedings." *Osborn v. IRS*, 754 F.2d 195, 197 (6th Cir. 1985). Owing to these deficiencies, the Sixth Circuit has determined that an *in camera* review of documents is appropriate only if the government cannot, in a public forum, provide adequate information supporting its withholdings. *Id.* at 197-98. But defendants have adequately justified their invocation of the FOIA exemptions, as explained below, so the in camera reviews sought by plaintiff are unwarranted. An *in camera* review of defendant's response to plaintiff's argument regarding FOIA exclusion §552(c)(3), however, is appropriate for the reasons discussed in § IV of this brief.

[6] The argument addressed in this section, and the arguments addressed in sections B and C (below), apply to all withheld documents except for the (1) DIOG-related training slides and (2) the withholdings from one partially released map, DE-GEOMAP 483-486, which plaintiff explicitly does not challenge. *See* Opp. at 14 n.13, 14.

meaningless. *Id.* And courts should review segregability decisions under Exemption 1 in a similarly deferential manner, because, "[i]n determining the applicability of Exemption 1, a reviewing court should accord *'substantial weight'* to the agency's affidavits regarding classified information." *Jones v. FBI*, 41 F.3d 238, 244 (6th Cir. 1994) (emphasis added). Courts do so because they "lack the expertise necessary to second-guess [ ] agency opinions in the typical national security FOIA case." *Krikorian v. Dep't of State*, 984 F.2d 461, 464 (D.C. Cir. 1993).

The deferential principles employed in *Dickerson* and *Jones* apply with equal force in this case. "Each page of every document was carefully reviewed, line by line, to determine if any information could be segregated for release." First Hardy Decl. ¶ 93. As a result of this review, the FBI has released 430 pages, in full or in part.[7] But it determined that no other "information could be segregated from any page or document for release." *Id.* ¶ 93. Importantly, these documents do not relate to investigations of run-of-the-mill petty crimes, but rather pertain to investigations and intelligence gathering about organized crime syndicates, domestic and international terrorist groups, and foreign governments operating covertly in the United States. The release of any further information, accordingly, "would cause serious damage to the national security; would cause harm to ongoing, pending, and anticipated future investigations and prosecutions, [would] reveal confidential sources, and would reveal sensitive analytical, intelligence gathering, and investigatory techniques and procedures that if known would allow criminals to circumvent the law." *Id.* ¶ 93. And the law does not require such harms to be inflicted in the name of FOIA. Rather, Courts exercise prudence in evaluating segregation decisions in the context of criminal investigations, national security, and foreign affairs, and prudence dictates that "the prospects for finding any reasonably segregable non-public portions of [these sensitive documents] that could properly be made public are [not] such

[7] The FBI released the 46 pages of communications after re-reviewing them, in accord with footnote 1 of defendants' opening memorandum.

as to justify" upending the expert agency's decisions. *Dickerson*, 992 F.2d at 1434 (internal quotation marks omitted); *see also Jones*, 41 F.3d at 244.[8]

B. The Record Supports Defendants' Segregability Decisions.

Plaintiff argues that "record evidence controverts Defendants'assertion that no racial or ethnic information can be segregated and disclosed." Opp.at 16. As an example, plaintiff states that, in a related case, defendants released a document "showing FBI use of census figures on Hispanics, African Americans, and individuals of Central American origin in New Jersey; a chart of 'New Jersey's top five Hispanic populated counties'; and a map concerning populations from "'El Salvador, Honduras Guatemala.'" *Id.* at 20. They also point to similar demographic information released with respect to Alabama and Georgia. *Id.*

The release of the documents highlighted by plaintiff does not demonstrate that defendants can disclose more "racial and ethnic information" from documents withheld under Exemption 7A. These documents addressed the threat posed to the areas of operation of various field offices, by a gang, MS-13, that was *no longer the subject of an active criminal investigation. See ACLU of New Jersey v. Dep't of Justice*, 11-CV-2553 (D.N.J.), Doc. No. 22, Dep't of Justice Reply/Opposition Brief, at 17-18. Thus, their release simply demonstrates that defendants can release more information from a document when the document does not relate to an active or prospective criminal investigation. But all of the documents from which plaintiff seeks more information (except for the DIOG-related training materials) pertain to active or prospective criminal investigation. And "[u]ntil these potential and pending enforcement proceedings . . . are concluded and resolved, none of the information sought by plaintiff can be released." First Hardy Decl. ¶ 59. To release the information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Racial and/or ethnic data can

[8] According to plaintiff, defendants argue that "when information in a record is covered by more than one FOIA exemption, Defendants are freed from their burden of disclosing the reasonably segregable *non-exempt* information in the record." Opp. at 19 (emphasis in original). This is not defendants' argument. Defendants have released all "reasonably segregable" non-exempt information.

be significant to an investigation. "National security investigations often have ethnic aspects; members of a foreign terrorist organization may be primarily or exclusively from a particular country or area of the world. Similarly, ethnic heritage is frequently the common thread running through violent gangs or criminal organizations [such as MS-13]." FBI, 2011 DIOG, § 4.3.1. Given these correlations, releasing demographic information about a specific ethnic group in a certain area (such as Detroit) compiled in the course of an investigation could reasonably be expected to alert a criminal or terrorist organization that it is the subject of an investigation. And this would allow the targeted group "to change their behavior and/or the 'players' to avoid detection and/or further investigation." First Hardy Decl. ¶ 59. Exemption 7A allows defendants to withhold information to avoid this harm and, thereby, protect the integrity of their investigations.

C. No Aspect of the FBI's Investigations Justifies Further Disclosure.

Plaintiff argues that defendants must "disclose publicly-available information revealing that the FBI is targeting Michigan communities based solely or primarily on their race, ethnicity, national origin, or religion" because (1) "such targeting is public knowledge and, as such, further disclosure would not harm any ongoing investigations under Exemption 7A's harm prong," and (2) this "targeting violates the DIOG and Guidance on Race, and thus cannot be withheld as a permissible 'intelligence source or method' under Exemption 1." Opp. at 17.

This argument depends on two premises, both of which are faulty. The first premise is that if some basic investigative technique is publicly known, then the disclosure of documents discussing the use of that technique in specific circumstances could not possibly hinder an investigation. This is nonsense. That the public knows the FBI sometimes tails criminal suspects does not mean that releasing details about ongoing surveillance of a specific criminal suspect would be harmless. The law applicable to an analogous argument made in the context of Exemption 1 is instructive. FOIA requesters sometimes oppose the invocation of Exemption 1 (which pertains to classified information) on the basis that the information withheld has already been released to the public. *See, e.g., ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 620-21

(D.C. Cir. 2011). When evaluating this argument, Courts look at whether any information previously released is as specific as the information sought by the requesters. *Id.* If the information sought is more specific, then courts do not treat the information sought as being in the public domain. Courts do this because "details" matter in national security. Of course, as demonstrated by the simple example provided earlier in this paragraph, they also matter in criminal investigations. And releasing these details "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

The second incorrect premise is that the withheld documents reveal that the FBI has violated internal guidelines by conducting "investigations" driven purely or predominantly by race, ethnicity or religion, and that defendants are withholding them under Exemption 1 (as classified documents) for that reason. Opp. at 17-19. As an example, plaintiff states that a document released in this case demonstrates that the Detroit Field Office impermissibly conducted an assessment of the Middle-Eastern and Muslim communities in its area of operation. Opp. at 17-18.

But the released document, as well as those that have been withheld, show that the FBI has acted in accordance with the law, including the DIOG. Plaintiff's use of the word "investigations" requires further explanation. What plaintiff appears to be complaining about is collection and analysis of demographic data, rather than the kind of activity one might associate with the phrase criminal investigation. Compl. ¶¶ 2,4. And the FBI's collection of demographic data, such as that discussed in the document cited by plaintiff, comports with the law, including the DIOG. Indeed, the DIOG states the following:

> [The law] permit[s] the FBI to identify locations of concentrated ethnic communities in the field office's domain, if these locations will reasonably aid the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis. If, for example, intelligence reporting reveals that members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity, the location of that community is clearly valuable – and properly collectible – data. Similarly, the locations of ethnic-oriented businesses and other facilities may be collected if their locations will reasonably

> contribute to an awareness of threats and vulnerabilities, and intelligence collection opportunities.

2011 DIOG § 4.3.3.2.1 (2008 DIOG § 4.3(C)(2)(a)). The document from the FBI field office cited by plaintiff explains, in conformance with the DIOG, that the Detroit field office wants to "collect[ ] information and evaluat[e] the threat posed by international terrorist groups conducting recruitment, radicalization, fund-raising, or even violent terrorist acts within the state of Michigan" because Michigan "is prime territory for attempted radicalization and recruitment by terrorist groups" given that "many terrorist groups originate in the Middle-East and Southeast Asia" and "use an extreme and violent interpretation of the Muslim faith as justification for their activities." DE-GEOMAP 484-85 (attached as Ex. K to First Hardy Decl.). In short, nothing in that document suggests that the FBI is violating the DIOG (or any other laws).[9] Rather, it supports the conclusion that defendants are withholding information under Exemption 1 for the reasons stated in the declaration, namely, to protect national security and foreign relations, and not to hide inappropriate conduct.[10]

D. Defendants Properly Invoked Exemption 1.

In its brief, plaintiff notes that the FBI's declaration does not state whether any publicly available information is being withheld under the auspices of Exemption 1.[11] *See, e.g.*, Opp. at 22. This is irrelevant. Plaintiff appears to be hinting that the official acknowledgment doctrine, which precludes invocation of Exemption 1, may apply. *See ACLU v. U.S. Dep't of Defense*, 628 F.3d at 620-21. That doctrine applies only if the plaintiff establishes the following criteria: (1) the information sought is no more specific than the information previously released; (2) the

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[9] Indeed, the FBI's selective accumulation of ethnic data also comports with the Department of Justice's Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, June 2003, at 9 (available on-line at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf) (permitting federal law enforcement agents protecting national security to consider race or ethnicity to the extent permitted by law).

[10] Even if the FBI were using an investigation technique later found to be illegal (which it is not), that in no sense vitiates the ability to assert Exemption 1. *See, e.g., ACLU v. U.S. Dep't of Defense*, 628 F.3d at 622 ("Documents concerning surveillance activities later deemed illegal may still produce information that may be properly withheld under exemption 1.").

[11] Plaintiff's argument applies to all documents over which defendants have invoked Exemption 1. *See* Opp. at 22, 25, 26, 28.

information requested matches the information previously disclosed (*i.e.*, for example, involves the same time period); and (3) the information requested has been made public through an official and documented disclosure. *Id.* Plaintiff has not established the existence of any of these criteria; it simply speculates that the information withheld may be in the public domain. Such speculation does not require the government to release classified information, especially because "[i]n determining the applicability of Exemption 1, a reviewing court should accord *'substantial weight'* to the agency's affidavits regarding classified information." *Jones*, 41 F.3d at 244 (emphasis added).

Plaintiff also maintains that the FBI has failed to explain in sufficient detail "why the material has been kept secret and why such secrecy is allowed by the terms of [the] executive order." *See, e.g.*, Opp. at 23 (quotation marks omitted, brackets in original). This argument is meritless. Exemption 1 allows an agency to withhold "matters that are - (A) specifically authorized under criteria established by an Executive order to be *kept secret in the interest of national defense or foreign policy* and (B) are in fact properly classified pursuant to such an Executive order." 5 U.S.C. § 552(b)(1) (emphasis added). Executive Order 13526 allows an agency to withhold information under Exemption 1 if its release would cause damage to national security and it pertains to, among other things, "intelligence activities . . . intelligence sources or methods, or cryptology," § 1.4(c), or "foreign relations or foreign activities of the United States, including confidential sources," § 1.4(d). The FBI properly invoked both sections in this case.

The FBI withheld portions of documents under § 1.4(c) of the Executive Order because disclosure could reasonably be expected to cause "serious damage" to national security for the following reasons: (1) disclosure would permit "hostile entities to discover the current intelligence activities used"; (2) "disclosure would reveal" or allow a hostile entity to "determine the criteria used--and priorities assigned to--current intelligence or counterintelligence investigations"; and (3) "disclosure would reveal the targets of the intelligence activities and investigations." First Hardy Decl. ¶ 52. Based on these kinds of disclosures, "[h]ostile entities could [ ] develop countermeasures which could severely disrupt the FBI's intelligence-gathering

capabilities." *Id.* Thus, for example, defendants have withheld (1) portions of the June 10, 2010 "Counterintelligence Program Assessment," which discusses "the intelligence and investigative interests in the Counterintelligence [field] for the Detroit Division, including threats, vulnerabilities, and knowledge gaps," First Hardy Decl. at pp. 34-35 (DE GEOMAP 618-51), and (2) portions of an assessment of foreign terrorist organizations, which "contain[s] recent intelligence information gathered by the FBI and other partners of the intelligence community on several foreign terrorist organizations active within the Detroit domain," *id.* at pp. 33-34 (DE-GEOMAP 569-89).

The FBI withheld, under § 1.4(d) of the Executive Order, portions of documents that "contain sensitive intelligence information gathered by the United States either about, or from, a foreign country," because, of course, "[r]evealing sensitive intelligence information gathered about, or from, a foreign country could injure diplomatic relations between the U.S. and those countries." First Hardy Decl. ¶ 54. Under this provision, defendants have withheld, for example, (1) parts of an October 2009 Domain Intelligence Note that "identifies and analyzes the presence and threat posed to certain industries and areas in Michigan by foreign entities," First Hardy Decl. at p. 49 (DE-GEOMAP 744-54), and (2) portions of an October 2009 Domain Intelligence Note that "identifies and analyzes the presence and threat posed to certain technologies and proprietary information in Michigan" by foreign intelligence activity, First Hardy Decl. at p. 50 (DE-GEOMAP 755-777).

Contrary to plaintiff's argument, and given the sensitivity of the subject matter and the deference owed the executive branch in the context of Exemption 1, the FBI supported nondisclosure with a sufficiently detailed explanation. *See Jones*, 41 F.3d at 244. A recent case from the D.C. Circuit, *Larson v. Dep't of State*, 565 F.3d 857, 867 (D.C. Cir. 2009), is instructive. In *Larson*, the National Security Agency withheld information under Exemption 1, and the court of appeals accepted "the necessity to foreign intelligence gathering of keeping targets and foreign communications vulnerabilities secret" as a sufficiently specific rationale for nondisclosure. *Id.* The FBI's explanations in this case, which are described above, are at least

specific as the explanation validated by *Larson*. First Hardy Decl. ¶¶ 52, 54-55. With respect to "intelligence activitites," the basis for the withholding is, among other things, "the necessity to [counter]intelligence gathering of keeping targets and . . . vulnerabilities secret." *Larson*, 565 F.3d at 867; First Hardy Decl. ¶¶ 51-53. And with respect to foreign relations, withholding the information is justified because releasing the information would jeopardize delicate foreign relations. First Hardy Decl. ¶ 54. Moreover, sound reasons exist for not demanding more detail: The release of more detail could undercut the purpose of the exemption – the protection of national security and foreign relationships – and the executive branch is in a better position than courts to assess such potential harm. *Larson*, 565 F.3d at 867; *Jones*, 41 F.3d at 244.

E. Defendants Appropriately Redacted the DIOG-Related Training Materials.

Plaintiff argues that defendants have not adequately justified their withholding, under Exemption 7E, of 10 pages of material from DIOG-related training materials (DIOG PPD 65-66, 123-24, 209-11, 239-40, 291-92). Opp. at 29. It insists that (1) defendants' justification "lack[s] [a] contextual description . . . of the documents . . . or of the specific redactions," (2) defendants have not demonstrated that any technique is not well known (because if the technique is already well known revealing it will not facilitate circumvention of the law), and (3) defendants' asserted basis for making redactions amounts to "inadequate" "boilerplate." *Id.* at 30 (internal quotations omitted, ellipses in original). Indeed, as to the last point, plaintiff argues that "the assertion that disclosure of these guidelines would 'cripple' the effectiveness of investigations and assessments is inapplicable to these particular slides, which appear to provide guidance to FBI agents on how to follow the law." *Id.* Exemption 7(E) protects from disclosure "records or information compiled for law enforcement purposes" when the release of such information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigation or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E) (emphasis added). Defendants withheld these documents under the second (*i.e.*, circumvention) prong of 7E. First Hardy Decl. ¶¶ 88, 90.

Insofar as plaintiff complains about defendants' alleged failure to provide a "contextual" description of the documents and the redactions, its argument borders on the frivolous. Defendants released 298 pages of DIOG-related training materials (*see* Ex. K to First Hardy Decl.), and a redacted copy of the DIOG itself is available on-line at plaintiff's website (http://www.aclu.org/national-security/aclu-seeks-records-about-fbi-collection-racial-and-ethnic-data-29-states-and-dc), so plaintiffs have a firm idea of the overall context within which the training records fit. Moreover, defendants have released, in unredacted form, the pages surrounding the redacted pages that they seek. *See* Ex. K. Thus, plaintiff also knows the narrower context within which the redacted portions of the training material fall – *i.e.*, text describing the training of FBI agents on the investigative constraints imposed by privacy and civil rights laws, such as the Privacy Act and the First Amendment. *Id.* at DIOG PPD 63-64, 67.

Plaintiff similarly cannot get any traction from its argument challenging defendants' asserted basis for redacting these materials. Defendants explained that the training materials contain a "number of concrete hypothetical examples that describe when particular activities or particular investigative techniques may be used" and "[t]hese training exercises are not known to the public because . . . [i]f an individual considering engaging in illegal activity were to become aware of specific activities that would or would not trigger authority for particular investigative activities or techniques, he or she could alter his or her behavior to avoid detection." First Hardy Decl. ¶ 90. Thus, contrary to plaintiff's suggestion, Opp. at 30, these techniques are "not known to the public." *Id.* ¶ 90. Moreover, the FBI could not explain the techniques more specifically without risking the harm – *i.e.*, circumvention of the law – that Exemption 7E is meant to prevent. *See Larson*, 565 F.3d at 867. Finally, plaintiff's insistence that the circumvention of the law rationale could not apply to the redacted information, because the information "appear[s] to provide guidance to FBI agents on how to follow the law," Opp. at 30, is without foundation. Plaintiff does not know the content of the redacted information and, in any case, the FBI's views of the limits of its investigatory powers certainly could facilitate circumvention of the law. For example, if the FBI instructed its agents that they could not search suspects' sofas, then everyone

would hide their contraband in their sofas. Revelations about the limits of the FBI's investigatory powers tell criminals how to stand just outside of its reach. The FBI need not reveal its non-public investigatory guidelines; the FOIA is not a stimulus program for criminals.

IV. Exclusions Should Be Addressed through *In Camera, Ex Parte* Filings.

Plaintiff has inquired as to whether defendants have documents that would be responsive to its FOIA request but for the fact that they are excluded from FOIA's scope pursuant to 5 U.S.C. § 552(c). *See* Opp. at 31. Section 552(c) provides that agencies may treat certain law enforcement and national security records "as not subject to the requirements" of FOIA. 5 U.S.C. § 552(c). Congress added this section to the FOIA in 1986 to create a mechanism for protecting especially sensitive law enforcement materials, including documents concerning (1) ongoing criminal investigations, (2) informant identities, and (3) classified foreign intelligence or international terrorism information. *Id.* §§ 552(c)(1), (c)(2) and (c)(3). Section 552(c) differs from 552(b), as Section 552(c) allows the government to "exclude" certain highly sensitive information from the scope of the FOIA, not simply "exempt" information from production. *Steinberg v. U.S. Dep't of Justice*, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997). "An 'exclusion" is different from an exemption in that the Government need not even acknowledge the existence of excluded information. Rather, the Government is permitted to file an *in camera* declaration, which explains either that no exclusion was invoked or that the exclusion was invoked appropriately." *Id.*

Because "it is essential to the viability of the exclusion mechanism that requesters not be able to deduce whether an exclusion was employed at all in a given case," it is "the government's standard litigation policy . . . that wherever a FOIA plaintiff raises a distinct claim regarding the suspected use of an exclusion, the government routinely will submit an *in camera* declaration addressing that claim, one way or the other." Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act,
§ G ("Attorney General Memo") (available at www.justice.gov/oip/86agmemo.Htm

#exclusions). Plaintiff's question regarding whether defendants have relied on 552(c) in this case is thus addressed in defendants' *in camera, ex parte* declaration, filed May 10, 2012.

Just as it is vital to the integrity of the exclusion provisions that the government file an *in camera* declaration any time a plaintiff raises a distinct claim under 552(c), regardless of whether the government actually relied on 552(c), it is paramount that a court, after reviewing the government's *in camera, ex parte* submission, not indicate in any manner whether there is or is not an exclusion in play. *Id.* at 30. If a court is satisfied with the government's submission, a public decision may not confirm or deny that an exclusion was actually invoked, but may state only that "a full review of the claim was undertaken and that, if an exclusion in fact was employed, it was, and continues to remain, amply justified." *Id.; Beauman v. FBI*, Civ. No. 92-7603 (C.D. Cal. Apr. 28, 1993) (attached as Exhibit 2)**.**

Plaintiff proposes novel procedures for adjudication of its claim under Section 552(c) of the FOIA. *See* Opp. at 32-35. Specifically, it asks the Court to require defendant-agencies to submit "public court filing[s]" indicating whether the agencies interpret all or part of a plaintiff's FOIA request as seeking records that, if they exist, would be excludable under Section 552(c)(3). *Id.* at 33. The parties "briefing and the Court's opinion would address a *hypothetical question* – whether any of the requested records, *if they exist*, fall under Section 552(c) . . . ." Opp. at 35 (emphasis added).

Plaintiff's proposal should be rejected. In every instance, defendants would have to respond affirmatively to the question of whether they interpret the request to seek records that, if in existence, would fall under one or more of the exclusions. If defendants did not always state that an exclusion could be at play, then their actions would imply when an exclusion was at play and when it was not. Thus, the "hypothetical" question would be briefed in every case in which a plaintiff alleges that defendants have invoked an exclusion. And in their briefs, defendants could do nothing more than parrot the language of the exclusion provision, lest they reveal either the information they seek to exclude or the fact that no such information exists. But the Court need not adjudicate hypotheticals. Defendants submitted an *in camera, ex parte* declaration to

the Court with the filing of this brief, thereby allowing the Court to determine whether any exclusion was properly used. As other courts have done when presented with 552(c) *in camera* submissions, the Court can determine the correctness of any reliance on the exclusion provisions, and then state on the public record that "if an exclusion was invoked, it was and remains amply justified." *See, e.g., Steinberg v. Dep't of Justice*, 1997 WL 349997, *1 (D.D.C. June 18, 1997).

CONCLUSION

The Court should dismiss plaintiff's action for lack of subject matter jurisdiction or, in the alternative, enter judgment in favor of defendants.

Dated: May 25, 2012

Respectfully submitted

STUART F. DELERY
Acting Assistant Attorney General

BARBARA MCQUADE
United States Attorney

ELIZABETH J. SHAPIRO
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CERTIFICATION OF SERVICE

I hereby certify that on May 25, 2012, I electronically filed the attached papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Hina Shamsi
Mark P. Fancher
Michael J. Steinberg
Nusrat J. Choudhury
Stephen C. Borgsdorf

I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

None.

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***ACLU of Michigan v. U.S. Dep't of Justice, et al.*, 2:11-CV-13154**

Index of Exhibits to Defendants' Brief of May 25, 2012

Exhibit 1 – Supplemental Declaration of David M. Hardy, Section Chief of the Record/Information Dissemination Section of the Records Management Division, FBI, May 24, 2012 (and Exhibits A & B to declaration)

Exhibit 2 – *Beauman v. FBI*, Civ. No. 92-7603 (C.D. Cal. Apr. 28, 1993)

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN CIVIL LIBERTIES UNION OF Michigan, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Civil No. 2:11-cv-13154

SUPPLEMENTAL DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (RIDS), Records Management Division, formerly at Federal Bureau of Investigation (FBI) Headquarters in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. As Section Chief of RIDS, I supervise approximately 275 employees who staff a total of ten units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA.

(2) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a, and I am aware of the FBI's responses to the FOIA request made by plaintiff, the

American Civil Liberties Union of Michigan, which seeks access to records pertaining to the FBI's use of race and ethnicity to collect information about and "map" racial and ethnic demographics, "behaviors," and "life style characteristics" in local communities in Michigan.

(3.) I am also familiar with the plaintiff's assertion that the FBI's search is deficient. As a result of the plaintiff's claim, RIDS reviewed its records verifying the status of each and every search conducted to ensure that a search of all logical locations, reasonably calculated to uncover responsive material, by individuals with the requisite knowledge to understand the scope and depth of the information sought and the likely locations of such material, was conducted with full understanding of the plaintiff's request and in accordance with the guidance provided in the RIDS electronic communication (search EC). Declaration of David M. Hardy, February, 17, 2012 (First Hardy Declaration), ¶¶ 22-37 (attached as Exhibit 1 to Defendants' Motion for Summary Judgment, February 17, 2012, Doc. No. 19) The purpose of this declaration is to further validate the searches undertaken, describe the results of any new searches, and to discuss any additional material located and released. As a result of new searches, 28 new pages of responsive material have been located. Of these pages, 23 have been released in full, and 5 pages have been released in partially redacted form, with redactions taken pursuant to FOIA Exemptions (b)(6) (b)(7)(C), and (b)(7)(E). The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

SEARCH DESCRIPTION

DETROIT FIELD OFFICE SEARCH

(4.) Following the filing of plaintiff's brief, and out of an abundance of caution, RIDS contacted the Detroit Field Office to confirm that it had conducted a search reasonably calculated to uncover all documents responsive to the request, as described in the First Hardy Declaration, ¶¶ 35-38. It had. Indeed, the Field Office explained that, as part of its search, it had searched the so-called 800 file series, which contains "Domain Management" and "Intelligence" files.

HEADQUARTERS OFFICES

(5.) Again, out of an abundance of caution, RIDS also contacted the relevant Headquarters offices identified in the First Hardy Declaration – the Corporate Policy Office (CPO), the Office of Public Affairs (OPA), the Office of Congressional Affairs (OCA), the National Security Law Branch of the Office of General Counsel (OGC), and the Intelligence Directorate (DI) – to confirm that they had conducted the search described in the First Hardy Declaration, ¶¶ 23-34.

CPO

(6.) RIDS confirmed that the CPO had performed a search of all locations reasonably calculated to uncover responsive documents and that documents were produced as a result of the search – as described in the First Hard Declaration, ¶¶ 29-34. The CPO documents produced consist of the DIOG training material found at DIOG PPD 1-298 in Exhibit K to the First Hardy Declaration.

OPA

(7.) OPA could not determine what steps it had taken in response to the initial search EC. Therefore, out of an abundance of caution, OPA immediately undertook a new search in conformance with the search described in the First Hardy Declaration, ¶¶ 29-34. OPA located five responsive documents. *See* Exhibit A.

OCA

(8.) Although OCA's records reflect that it had conducted a search in response to the original search EC, records do not confirm that the product of its search was included in the original production. Therefore, OCA undertook a second search, which tracked the search described in the First Hardy Declaration, ¶¶ 29-34. OCA personnel located one responsive document. *See* Exhibit B.

OGC

(9.) RIDS verified that the Office of General Counsel/National Security Law Branch had conducted a search in compliance with the search EC and that all locations likely to contain records responsive to plaintiff's request were searched – as described in the First Hardy Declaration, ¶¶ 29-34.

DI

(10.) RIDS verified with the Intelligence Directorate that it had conducted a search of all logical locations, reasonably calculated to uncover responsive documents, as described in the First Hardy Declaration, ¶¶ 29-34.

DESCRIPTION OF THE DOCUMENTS LOCATED AND REVIEWED

OCA PRODUCTION

(11.) The first document, produced by OCA, is part of a large multi-subject response to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on the Judiciary at the United States Senate on March 25, 2009. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." Only question 9 and its response contain information responsive to plaintiff's request for, among other things, records concerning "the FBI's use of race and ethnicity to conduct assessments and investigations in local communities in Michigan," and the "FBI's implementation of its authority to collect information about and 'map' racial and ethnic demographics, 'behaviors,' and 'life style characteristics' in local communities in order to assist the FBI's 'domain awareness' and 'intelligence analysis' activities." The FBI is releasing the responsive portion of the document, a question and response concerning racial profiling, to the plaintiff without redaction. In addition, the FBI is providing the cover letter from that document, also without redaction, for context. (DE GEOMAP-1580-1581)

OPA PRODUCTION

(12.) The next five documents were produced by OPA. The first of these items is titled, "Public Affairs Guidance" (DE GEOMAP-1554-1560), is dated August 11, 2008, and was intended to be used by OPA to discuss internally within the FBI upcoming changes that would result from the adoption of the Attorney General's Guidelines for Domestic FBI Operations (AG-DOM) that were expected to become effective October 1, 2008. The plaintiff's request is specific to the portions of the DIOG

concerning the FBI's use of race and ethnicity for law enforcement purposes. In light of this, only portions of the material were found to contain responsive information. The FBI has processed and released all responsive, segregable, non-exempt information. For privacy purposes, the telephone number of an FBI employee has been redacted under FOIA Exemption (b)(6) and (b)(7)(C) from DE GEOMAP-1554. *See* First Hardy Declaration, ¶¶ 64-66 for a more detailed explanation of the basis of this exemption. Additionally, FOIA Exemption (b)(7)(E) has been applied to DE GEOMAP-1554 and 1557 to redact (a) specific examples of when activities or particular investigative techniques may be used, (b) information regarding various levels of approval required for certain investigative techniques or procedures, and (c) information on the technical or practical limitations of particular investigative techniques. *See* First Hardy Declaration, ¶¶ 88, 90, 91.

(13.) The second item, "AGG/FBI POLICY FAQs" (DE GEOMAP-1561 - 1562), was used by OPA for training purposes and discusses multiple subjects located in the AGG-DOM. Again, the plaintiff's request is specific to the portions of the DIOG concerning the FBI's use of race and ethnicity for law enforcement purposes, so large portions of this document are not responsive. The FBI processed and released all responsive, segregable, non-exempt information. FOIA Exemption (b)(7)(E) has been applied to information on DE GEOMAP-1562 to protect FBI guidelines for law enforcement procedures/techniques, the use of examples of a technique, approval limitations on techniques or procedures that may be used in certain types of investigations, and the use of sources as an investigative tool. *See* First Hardy Declaration, ¶¶ 82, 88, 90-91.

(14.) The third and fourth are drafts of a document entitled, "Domestic Investigations and Operations Guide Frequently Asked Questions," (DE GEOMAP-1563 - 1569, and 1570-1576), which was intended for use by OPA for training purposes to discuss many subject areas found in the AGG-DOM and DIOG. The plaintiff's request is specific to the portions of the DIOG concerning the FBI's use of race and ethnicity for law enforcement purposes, so large portions of those documents are not responsive. But the FBI has processed and released all segregable, responsive, non-exempt information. FOIA Exemption (b)(7)(E) has been applied to information on DE GEOMAP-1566 and 1573 to protect (a) guidelines for law enforcement procedures and techniques, (b) approval limitations on techniques or procedures that may be used in certain types of investigations , and (c) technical or practical limitations on particular investigative techniques. *See* First Hardy Declaration, ¶¶ 88, 90, 91.

(15.) The fifth and final item RIDS received from OPA is a document titled, "The Attorney General's Guidelines for FBI Domestic Operations." (DE GEOMAP 1577-1579). This document is an internal training document used by OPA and discusses the AGG-DOM. The document has been released in full.

CONCLUSION

(16.) The FBI has now confirmed the details of the original search and conducted new searches when it deemed doing so appropriate. A line-by-line review was conducted of each and every document, and all non-exempt, segregable information has now been released.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of May, 2012.

DAVID M. HARDY
Section Chief
Record/Information
Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, VA

EXHIBIT A

Federal Bureau of Investigation
Office of Public Affairs
National Press Office

Public Affairs Guidance

POC: DAD Michael P. Kortan, [redacted] michael.kortan@ic.fbi.gov

Issued as of 08/11/2008

Topic: Attorney General Guidelines for FBI Domestic Operations

Press Guidance:

Talking points and Q&As below are **for internal use only**. Any press inquiries related to this topic should be referred to the National Press Office, 202-324-3691, and to the Department of Justice (DOJ) Office of Public Affairs.

Issue:

DOJ is in the final stages of drafting the Attorney General's Guidelines for Domestic FBI Operations (AG-DOM). The week of August 11 DOJ and FBI officials will brief lawmakers and their staffs as well as civil liberties groups who will have an opportunity to voice any concerns and make suggestions for improvement. It is anticipated that the guidelines will be signed later this month and will be effective October 1, 2008.

The FBI is developing a comprehensive policy framework to implement the AG-DOM. This policy framework will include controls, checks, and oversight mechanisms to ensure full compliance with the guidelines and continued safeguarding of civil liberties and privacy rights.

The AGG-DOM will:

1. Replace 5 sets of guidelines with one uniform set of guidelines.

2. Set consistent rules for all domestic activities, regardless of whether the activity is motivated by a desire to thwart traditional criminal conduct, terrorism or counterintelligence activities.

3. Establish a category of conduct called "Assessments" which will permit the FBI to satisfy its intelligence mission in a way that respects civil liberties. Assessments are authorized for purposes of:

   - Prompt and extremely limited checking of leads (e.g., anonymous tip that X is a terrorist or drug dealer)

   - Assessing potential targets or vulnerabilities to criminal activity or threats to the national security (e.g., mapping the domain to see vulnerabilities and treats such as [redacted]

   - Obtaining information to inform actions of the FBI and to facilitate intelligence analysis and planning (e.g., gathering and analyze information regarding travel to areas in which there is terrorist training on-going).

- Matters of foreign intelligence (FI) interest that would be responsive to FI requirements.

4. Maintain traditional levels of investigation: Preliminary Investigations (investigation based on limited predication for a limited period of time with some investigative techniques not available); Full Investigations (investigations based on more compelling predication for an unlimited time with all investigative techniques available).

5. Rename Racketeering Enterprise Investigations as "Enterprise Investigations." Designed to permit long term investigations of groups that have an existence that continues beyond that of any group of members (e.g., Al Qaeda; La Cosa Nostra Families).

Talking Points:

- The new AG Guidelines are needed to:

  1. give the FBI a modern policy framework to help us operate in a modern threat environment in which criminal and national security matters often overlap; and

  2. enable the FBI to be more proactive, predictive, and preventative in fulfilling its mission.

- The FBI will implement the new AG Guidelines with a comprehensive policy framework that includes extensive controls and checks to ensure that civil liberties and privacy rights are protected. Policies are currently being drafted and may be revised to address any issues raised in briefings with civil liberties groups and/or Members of Congress.

- Consolidating the Guidelines into a consistent, clear, uniform set document that does not, through lack of clarity or rule differences, create a wall between national security and criminal investigations is critical to the transformation of the FBI.

Outside the Scope

Q&As:

Outside the Scope

What controls are in place to ensure these new authorities are not abused?

1. The AGG-DOM contain several general statements of policy.
   - No investigation can be commenced based solely on ethnicity or the exercise of First Amendment rights.
   - The FBI should use the least intrusive method that is feasible under the circumstances.
   - In connection with Foreign Intelligence collection, agents should operate openly and overtly with US Persons if possible.
   - All activities must have an authorized and proper purpose. We interpret that to mean there has to be a purpose that is tied to an FBI mission.
2. There will be a strong regime of oversight from DOJ.
   - The oversight regime through mandatory reporting will be streamlined to focus on items of highest sensitivity (v. burying DOJ with reports).
   - On the national security side, the initiation of full investigations of US persons must be reported to DOJ.
   - All investigations with "sensitive circumstances" must be reported to DOJ. "Sensitive circumstances" means a matter involving a domestic public official, a political candidate, a religious or political organization or a person prominent in such organization or the media.
   - The initiation of enterprise investigations must be reported to DOJ (either OCRS or NSD, as appropriate).
   - The initiation of all investigations to collect foreign intelligence must be reported to the NSD. Thereafter, FBI must report annually on foreign intelligence collection matters. [Pure FI, not CI or CT matters.]

DE GEOMAP-1556

- Assistance to foreign agencies if the assistance is of a nature that requires FBI HQ approval (those approval levels not set; will likely be required if techniques beyond assessment techniques are used).

3. Other DOJ oversight

   - Traditional oversight of criminal matters continues to come through the relationship between FBI and US Attorney's Offices.

   - DOJ is generally permitted to seek information on any investigation or group of investigations as it sees fit.

   - Consensual monitoring in "sensitive monitoring circumstances" must be approved by DOJ. "Sensitive monitoring circumstances" includes, among others, consensual monitoring of high level federal officials and high level state officials.

   - "National Security Reviews" conducted jointly by DOJ's National Security Division and FBI-OGC. These grew out of the NSL situation, but the scope of the review is much broader and is intended to provide oversight of those investigations that would not likely have USAO involvement.

   - Office of Inspector General is always available with helpful reviews, audits and recommendations.

4. FBI Policy - The FBI will implement the new AG Guidelines with a comprehensive policy framework that includes extensive controls and checks to ensure that civil liberties and privacy rights are protected.

   - Policies are still being drafted, but the overarching theme is to use risk analysis to govern approval levels (higher the risk either of the subject matter or the technique, the higher the level of required review). Examples follow:
     - Searching public or government data bases – low risk; no supervisor approval required
     - Conducting surveillance without sensitive circumstances during an assessment – higher risks; approval required.
     - [redacted] – much higher risk; much higher approval levels.

5. The FBI is putting in place a framework of approvals, reporting, recordkeeping, and strong oversight to govern Assessments. There are control mechanisms at all levels, from the Supervisor signing Assessment paperwork and conducting 90-day file reviews, to Chief Division Counsel reviews of sensitive matters, to programmatic reviews from FBIHQ. Additional internal controls include:

   - Office of Integrity and Compliance is putting into place a policy and methodology to ensure compliance.

   - Inspections Division will have on-going responsibility for reviewing compliance.

DE GEOMAP-1557

- Office of General Counsel is heavily involved with both the compliance efforts and with identifying areas where there may be confusion regarding the rules.

- The new Sensitive Operations Review Committee (SORC) will provide for SES-level reviews of highly sensitive matters.

6. Congressional controls through oversight will continue.

The new domestic guidelines appear to eliminate the requirement for any predication or factual basis for a new category of FBI investigation–called an "assessment," which only requires a "proper purpose." Doesn't this mean that the FBI can investigate anyone or any group in the U.S. without any factual basis to believe they are connected to crime or terrorism–as long as it is done for the right reason? If so, doesn't this guidance return the FBI to the days of COINTELPRO when they could spy on Americans for purely political purposes?

NO. There are many safeguards within and outside the new guidelines that would prevent any return to the conduct that was permitted in the days of COINTELPRO. Here are some of them:

1. An assessment only permits the use of a limited list of investigative methods for the purposes of either assessing the validity of an allegation or "lead" or, on a pro-active basis, filling national intelligence requirements or determining the existence or absence of a criminal or national security threat or vulnerability. Persons and groups are not targeted and investigated in the traditional sense in an assessment. Allegations, threats, and vulnerabilities are examined and national intelligence requirements are filled. If the results of an assessment provide the factual predication to investigate a specific person or a group of persons, a criminal or national security investigation must be opened and pursued if the predication meets the standard set forth in the guidelines. If, on the other hand, an assessment reveals no basis to investigate a person or a group, then the matter is closed.

2. The techniques available in an assessment are geared to the gathering of publicly available information, information in government databases, or information known or lawfully obtained by human sources who are familiar with the matter being assessed. More intrusive techniques such as electronic surveillance, the use of search warrants and National Security Letters, undercover infiltration, and counter-intelligence tactics will not be permitted. Some of these techniques were used in COINTELPRO to gather intelligence–they will not be used in an assessment.

3. Since the days of COINTELPRO, the legal landscape has changed considerably. Today, law enforcement and intelligence collection activity by federal agencies must comply with the Privacy Act, the Federal Wiretap Act, the Foreign Intelligence Surveillance Act, the Right to Financial Privacy Act, the Electronic Communications Privacy Act, the Fair Credit Reporting Act, the Family Educational Records Privacy Act, the Bank Secrecy Act, the E-Government Act and a host of federal regulations and policies–all of which are still in full effect and none of which have been diminished in any way by these new guidelines. In addition, a considerable body of federal case law has matured over the past 35 years interpreting constitutional and statutory authorities which binds the FBI's activities. Internal FBI policies and training are geared to reflect this legal landscape.

4. Two other new standards have emerged since the 1970's that are built into these new guidelines that are pertinent to this discussion:

   - No investigative activity can be conducted, and no record can be maintained, solely on the basis of a person's exercise of rights guaranteed by the First Amendment to the Constitution; and

   - No investigative activity man be conducted, and no record maintained solely, on the basis of race or ethnicity.

5. The new guidelines–like prior versions but unlike the COINTELPRO time period--contains other safeguards that are designed to protect privacy and civil liberties. These include higher approval levels and standards for investigative activity that involves what are described as "sensitive circumstances." These circumstances include investigative activity that involves, to any degree, political, social or religious groups engaged in the exercise of First Amendment rights. A key safeguard is the requirement for a legal review by trained counsel who examines the justification for the activity, whether there are less intrusive investigative alternatives available, and whether are mitigation steps that can be taken to lessen the risk of affecting the rights of members of the public.

6. The training of new agents and analysts has evolved to include considerable emphasis on the protection of privacy and civil liberties.

7. Oversight provisions (see above)

What level of approval will be required for the FBI to conduct an assessment of a political or religious group?

No assessment, or any other type of investigative activity, can be undertaken based solely on activities protected by the First Amendment. In an instance where there is information such as a specific threat lead indicating that a group may pose a threat of violence, an assessment may be permissible, but it is safe to say that such an activity would require the highest level of scrutiny.

Does the AGG-DOM allow the FBI to conduct Assessments based on speculation?

No. The guidelines expressly state that the basis of any assessment must not be arbitrary or groundless speculation. Furthermore, there must be a rational and articulable relationship between the stated purpose of the assessment on the one hand and the information sought and the proposed means to obtain that information on the other. Management is responsible for assuring that assessments are not pursued for frivolous or improper purposes.

Is the FBI permitted to map mosques or other religious institutions?

1. The FBI cannot map a religious institution solely because it is a religious institution.

2. Pursuant to existing guidelines and the AGG-DOM, if the FBI has an open assessment, preliminary or full investigation, investigators or analysts can geo locate a facility

relevant to that assessment or investigation. However, the practice of religion is protected by the First Amendment and therefore cannot be the basis of any intelligence collection or analysis unless there are additional factors indicating a threat or vulnerability.

Is the FBI permitted to map racial or ethnic groups?

Under the DOJ Guidance Regarding the Use of Race by Law Enforcement Agencies, investigative activity (including collection of domestic intelligence) may not be based solely on racial or ethnic characteristics. Therefore, collecting information about—and mapping the locations of—racial or ethnic communities may not be conducted on that basis alone. There must be a valid law enforcement or national security basis for such collection. In practical terms, that means the collection must be based on the need to determine threats, vulnerabilities, and intelligence gaps in the domain and must be for one of the purposes for which an assessment is authorized under the guidelines. Documentation to justify such a collection under the assessment investigative category should include the basis for the collection and reflect a rational relationship between the threat or vulnerability to be assessed and the information to be collected.

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Outside the Scope

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AGG/FBI POLICY FAQs

What do the new guidelines cover?

The Attorney General's Guidelines for Domestic FBI Operations (AGG-DOM) govern all FBI investigative and intelligence gathering activities conducted in the United States or outside the territories of all countries. Activities conducted inside foreign countries are governed by the Attorney General's Guidelines for Extraterritorial FBI Operations.

What guidelines are being replaced?

These guidelines are expected to replace five existing sets of guidelines:

- The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 30, 2002)
- The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (October 31, 2003)
- The Attorney General's Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence (November 29, 2006)
- The Attorney General Procedure for Reporting and Use of Information Concerning Violations of Law and Authorization for Participation in Otherwise Illegal Activity in FBI Foreign Intelligence, Counterintelligence or International Terrorism Intelligence Investigations (August 8, 1988)
- The Attorney General's Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest (April 5, 1976)

When will the AGG-DOM be in effect?

The FBI will be operating under the new guidelines and our implementing policy on October 1, 2008.

What does the new policy framework look like for FBI domestic investigations?

At the top is the AGG-DOM. This is implemented across all programs and divisions in the Domestic Investigations and Operations Guide (DIOG), which will replace most of the existing Manual of Investigative Operations Guidelines. The DIOG is further implemented by individual program implementation guides. The AGG-DOM and DIOG are effective October 1, 2008. The program implementation guides will be effective December 1, 2008.

How will you educate the workforce and ensure everyone is in compliance with the new rules by October 1?

An aggressive training and communications strategy is planned to educate the workforce, including: mandatory web-based training, an employee town hall, user friendly reference materials, communications tools kits for managers and Chief Division Counsels, and updates to the New Agents and Analysts training curriculum as well as other in-service training.

What prevents the FBI from conducting surveillance of legitimate organizations and minority groups?

1. The guidelines allow for the use of physical surveillance in a Preliminary or Full investigation, or in an Assessment., but like all investigative activities, physical surveillance cannot be conducted based on speech or activities protected by the First Amendment.

2. Draft FBI policy would require review by the Chief Division Counsel and approval by the Special Agent in Charge, before surveillance could be conducted on a political, minority, religious, or university group. Additional notice to FBIHQ is also required for most Assessments (except for tracking leads) and notice to DOJ is required before a

When will an assessment of a political group be approved?

1. As with all Assessments, there must be an authorized purpose that is not based on activities protected by the First Amendment. Additional scrutiny is applied before an Assessment may be undertaken to look into a political, religious, news media, or university organization. The Chief Division Counsel must review and the SAC approve the initiation of such an Assessment.

2. The CDC will examine: the seriousness/severity of the violation or threat; significance of the information sought to the violation or threat; probability that the proposed course of action will be successful; risk of public exposure and possible adverse impact on civil liberties and public confidence; and risk to the national security or public welfare if the proposed course of action is not approved (i.e. the risk of doing nothing.)

3. It is also a requirement to notify the appropriate FBIHQ Section Chief and Unit Chief, the U.S. Attorney or DOJ Criminal Division or National Security Division. This is for oversight purposes.

What prevents the FBI from infiltrating legitimate organizations and minority groups?

1. Undercover operations not permitted for Assessments, nor can Agents task a Confidential Human Source to do something they could not do themselves.

2. Use of undercover operations and/or the use of Confidential Human Sources are permissible for Preliminary and Full investigations with appropriate supervisor approval.

[redacted] b7E

Does the AGG-DOM allow the FBI to conduct Assessments based on speculation?

No. The guidelines expressly state that the basis of any assessment must not be arbitrary or groundless speculation. Furthermore, there must be a rational and articulable relationship between the stated purpose of the assessment on the one hand and the information sought and the proposed means to obtain that information on the other. Management is responsible for assuring that assessments are not pursued for frivolous or improper purposes.

DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE FREQUENTLY ASKED QUESTIONS

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Outside the Scope

[redacted]

D. Safeguarding Civil Liberties

What controls are in place to ensure these new authorities are not abused?

1. The AGG-DOM contain several general statements of policy.

   - No investigation can be commenced based solely on ethnicity or the exercise of First Amendment rights.

   - The FBI should use the least intrusive method that is feasible under the circumstances.

- In connection with Foreign Intelligence collection, agents should operate openly and overtly with US Persons if possible.

- All activities must have an authorized and proper purpose. We interpret that to mean there has to be a purpose that is tied to an FBI mission.

2. There will be a strong regime of oversight from DOJ.

   - The oversight regime through mandatory reporting will be streamlined to focus on items of highest sensitivity (v. burying DOJ with reports).

   - On the national security side, the initiation of full investigations of US persons must be reported to DOJ.

   - All investigations with "sensitive circumstances" must be reported to DOJ. "Sensitive circumstances" means a matter involving a domestic public official, a political candidate, a religious or political organization or a person prominent in such organization or the media.

   - The initiation of enterprise investigations must be reported to DOJ (either OCRS or NSD, as appropriate).

   - The initiation of all investigations to collect foreign intelligence must be reported to the NSD. Thereafter, FBI must report annually on foreign intelligence collection matters. [Pure FI, not CI or CT matters.]

   - Assistance to foreign agencies if the assistance is of a nature that requires FBI HQ approval (those approval levels not set; will likely be required if techniques beyond assessment techniques are used).

3. Other DOJ oversight:

   - Traditional oversight of criminal matters continues to come through the relationship between FBI and US Attorney's Offices.

   - DOJ is generally permitted to seek information on any investigation or group of investigations as it sees fit.

   - Consensual monitoring in "sensitive monitoring circumstances" must be approved by DOJ. "Sensitive monitoring circumstances" includes, among others, consensual monitoring of high level federal officials and high level state officials.

   - "National Security Reviews" conducted jointly by DOJ's National Security Division and FBI-OGC. These grew out of the NSL situation, but the scope of the review is much broader and is intended to provide oversight of those investigations that would not likely have USAO involvement.

   - Office of Inspector General is always available with helpful reviews, audits and recommendations.

4. FBI Policy - The FBI will implement the new AG Guidelines with a comprehensive policy framework that includes extensive controls and checks to ensure that civil liberties and privacy rights are protected.

   - Policies are still being drafted, but the overarching theme is to use risk analysis to govern approval levels (higher the risk either of the subject matter or the technique, the higher the level of required review). Examples follow:
     - Searching public or government data bases – low risk; no supervisor approval required
     - Conducting surveillance without sensitive circumstances during an assessment – higher risks; approval required.
     - [redacted] – much higher risk; much higher approval levels.

5. The FBI is putting in place a framework of approvals, reporting, recordkeeping, and strong oversight to govern Assessments. There are control mechanisms at all levels, from the Supervisor signing Assessment paperwork and conducting 90-day file reviews, to Chief Division Counsel reviews of sensitive matters, to programmatic reviews from FBIHQ. Additional internal controls include:

   - Office of Integrity and Compliance is putting into place a policy and methodology to ensure compliance.

   - Inspections Division will have on-going responsibility for reviewing compliance.

   - Office of General Counsel is heavily involved with both the compliance efforts and with identifying areas where there may be confusion regarding the rules.

   - The new Sensitive Operations Review Committee (SORC) will provide for SES-level reviews of highly sensitive matters.

6. Congressional controls through oversight will continue.

The new domestic guidelines appear to eliminate the requirement for any predication or factual basis for a new category of FBI investigation–called an "assessment," which only requires a "proper purpose." Doesn't this mean that the FBI can investigate anyone or any group in the U.S. without any factual basis to believe they are connected to crime or terrorism–as long as it is done for the right reason? If so, doesn't this guidance return the FBI to the days of COINTELPRO when they could spy on Americans for purely political purposes?

NO. There are many safeguards within and outside the new guidelines that would prevent any return to the conduct that was permitted in the days of COINTELPRO. Here are some of them:

1. An assessment only permits the use of a limited list of investigative methods for the purposes of either assessing the validity of an allegation or "lead" or, on a pro-active basis, filling national intelligence requirements or determining the existence or absence of a criminal or national security threat or vulnerability. Persons and groups are not targeted and investigated in the traditional sense in an assessment. Allegations, threats, and vulnerabilities are examined and national intelligence requirements are filled. If the results of an assessment provide the factual

predication to investigate a specific person or a group of persons, a criminal or national security investigation must be opened and pursued if the predication meets the standard set forth in the guidelines. If, on the other hand, an assessment reveals no basis to investigate a person or a group, then the matter is closed.

2. The techniques available in an assessment are geared to the gathering of publicly available information, information in government databases, or information known or lawfully obtained by human sources who are familiar with the matter being assessed. More intrusive techniques such as electronic surveillance, the use of search warrants and National Security Letters, undercover infiltration, and counter-intelligence tactics will not be permitted. Some of these techniques were used in COINTELPRO to gather intelligence–they will not be used in an assessment.

3. Since the days of COINTELPRO, the legal landscape has changed considerably. Today, law enforcement and intelligence collection activity by federal agencies must comply with the Privacy Act, the Federal Wiretap Act, the Foreign Intelligence Surveillance Act, the Right to Financial Privacy Act, the Electronic Communications Privacy Act, the Fair Credit Reporting Act, the Family Educational Records Privacy Act, the Bank Secrecy Act, the E-Government Act and a host of federal regulations and policies–all of which are still in full effect and none of which have been diminished in any way by these new guidelines. In addition, a considerable body of federal case law has matured over the past 35 years interpreting constitutional and statutory authorities which binds the FBI's activities. Internal FBI policies and training are geared to reflect this legal landscape.

4. Two other new standards have emerged since the 1970's that are built into these new guidelines that are pertinent to this discussion:

   - No investigative activity can be conducted, and no record can be maintained, solely on the basis of a person's exercise of rights guaranteed by the First Amendment to the Constitution; and

   - No investigative activity man be conducted, and no record maintained solely, on the basis of race or ethnicity.

5. The new guidelines–like prior versions but unlike the COINTELPRO time period--contains other safeguards that are designed to protect privacy and civil liberties. These include higher approval levels and standards for investigative activity that involves what are described as "sensitive circumstances." These circumstances include investigative activity that involves, to any degree, political, social or religious groups engaged in the exercise of First Amendment rights. A key safeguard is the requirement for a legal review by trained counsel who examines the justification for the activity, whether there are less intrusive investigative alternatives available, and whether are mitigation steps that can be taken to lessen the risk of affecting the rights of members of the public.

6. The training of new agents and analysts has evolved to include considerable emphasis on the protection of privacy and civil liberties.

Outside the Scope

What level of approval will be required for the FBI to conduct an assessment of a political or religious group?

No assessment, or any other type of investigative activity, can be undertaken based solely on activities protected by the First Amendment. In an instance where there is information such as a specific threat lead indicating that a group may pose a threat of violence, an assessment may be permissible, but it is safe to say that such an activity would require the highest level of scrutiny.

Does the AGG-Dom allow the FBI to conduct Assessments based on speculation?

No. The guidelines expressly state that the basis of any assessment must not be arbitrary or groundless speculation. Furthermore, there must be a rational and articulable relationship between the stated purpose of the assessment on the one hand and the information sought and the proposed means to obtain that information on the other. Management is responsible for assuring that assessments are not pursued for frivolous or improper purposes.

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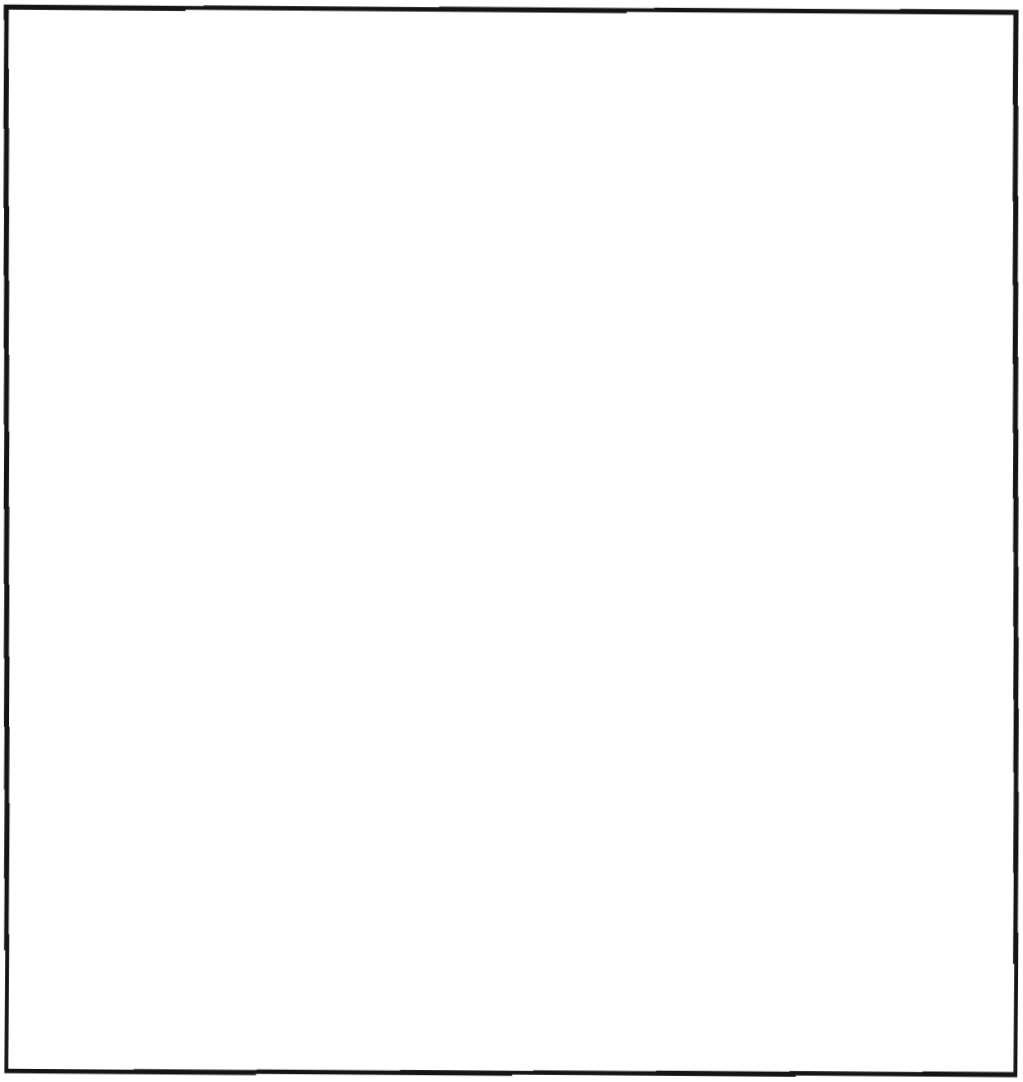

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2. There will be strong oversight from DOJ.
   - The oversight regime, through mandatory reporting, can streamline the focus to items of highest sensitivity (v. burying DOJ with reports).
   - In matters of national security, the initiation of Full Investigations of U.S. persons must be reported to DOJ.
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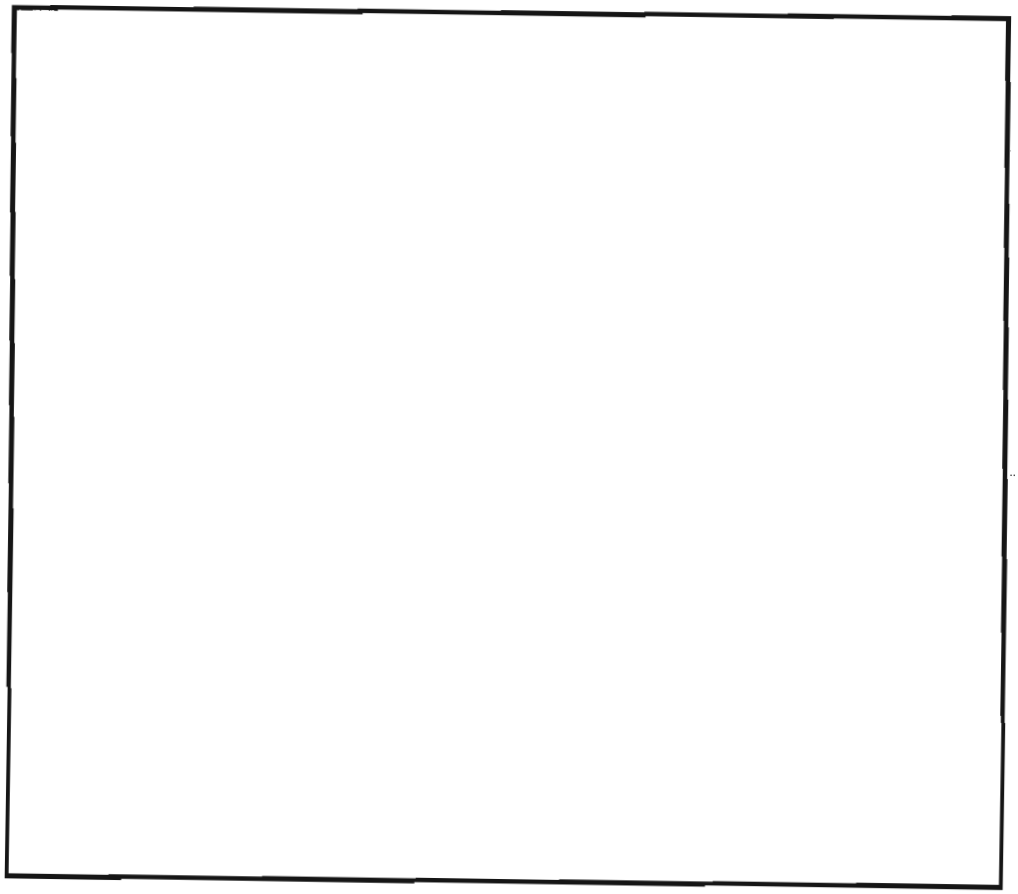

The Attorney General's Guidelines for FBI Domestic Operations

- The new AG Guidelines are needed to:

    1. give the FBI a modern policy framework to help us operate in a modern threat environment in which criminal and national security matters often overlap.

    2. to enable the FBI to be more proactive, predictive, and preventative in fulfilling its mission.

- The FBI will implement the new AG Guidelines with a comprehensive policy framework that includes extensive controls and checks to ensure that civil liberties and privacy rights are protected. Policies are currently being drafted and may be revised to address any issues raised in briefings with civil liberties groups and/or Members of Congress.

Benefits of the AG Guidelines:

- **Uniform** -- Because today's threats are intertwined and do not follow our programmatic boundaries, the FBI needs a uniform set of investigative rules, with the same definitions, approval and reporting requirements across all programs. This will eliminate the need for intelligence collectors and investigators to continuously decide which set of rules to follow in a particular situation.

- **Clear** - Having one clear set of guidelines will help ensure consistency and compliance in the FBI's domestic operations.

- **A necessary next step in FBI fulfilling post 9/11 mandate for the FBI to "strengthen and improve its domestic [intelligence] capability" -**

    – The FBI has a mandate to stay ahead of threats and to be more predictive and preventative in executing its mission. Expectations are that we must intervene earlier and focus on disruption and dismantlement of threats in addition to investigating crimes and acts of terrorism after the fact.

    – It is not enough to wait for leads to come in and piece together intelligence from our cases. If we focus only on what we know we may fail to prevent the next terrorist attack, the next corporate fraud problem that may undermine confidence in the economy, or the violent gang starting to get a foothold in a new area.

    – The new guidelines will give us the authorities we need to be more strategic and intelligence-driven in our planning and our operations. So we are:

        • connecting the dots AND (where authorized) collecting more "dots" to ensure we have a complete picture

- focusing finite resources on the most critical threats
- working with public and private partners to stay ahead of developing threats
- addressing the intelligence needs of Law Enforcement, Intelligence Community, and other customers

- The guidelines expressly address intelligence collection to drive strategy outside of traditional investigations to build a case for prosecution, such as collection to address intelligence requirements or to promote strategic awareness of our Area of Responsibility. The guidelines outline clear boundaries for these activities, consistent with the Constitution and all applicable laws and regulations, and the FBI is putting in place a framework of approvals, reporting, recordkeeping, and oversight.

Addressing Speculation:

- While there may be a lot of speculation about the impact of the new guidelines, the vast majority of the authorities outlined in the AGG are not new. There are two key techniques that will now be available for Assessments that were not available under the previous guidelines:

  – Previously, the FBI could not recruit and task a source without factual predication of a federal crime or national security threat justifying a Preliminary or Full Investigation. Under the new guidelines, a source may be tasked for an authorized purpose, even if there is no specific factual predication.

  – Previously, the FBI could not conduct physical surveillance without factual predication of a federal crime or national security threat. Under the new guidelines, physical surveillance can be conducted for a proper purpose. Electronic surveillance is not permissible without factual predication.

  – The use of these techniques is necessary to:

    - more quickly and thoroughly track down leads

    - strengthen – and make better use of – our source base by allowing us to more easily identify and recruit new sources, check on the credibility of a source, or ask an existing sources questions to respond to intelligence requirements or to inform strategic analysis and planning

- The new guidelines do not permit investigative activities or analysis based solely on race, ethnicity, religion, or any activities or speech protected by the First Amendment.

Safeguarding civil liberties:

- Certain principles are woven throughout the AGG-DOM:

- Activities must have a legitimate or "authorized" purpose.

- No Assessments or investigations may be initiated based solely on activities or affiliations protected by the First Amendment.

- No activity may undertaken based solely on race or ethnicity

- The least intrusive method that can be used to accomplish the purpose should be used.

- To ensure these principles are adhered to, the FBI is developing an implementation policy that spells out procedures, approval requirements, reporting requirements, and limitations on methods and duration of activities. The more intrusive a technique, the more checks are imposed on it.

  - All FBI personnel will receive training on the guidelines and adherence to Constitutional principles.

  - Supervisors, Program Managers, the Inspection Division, Office of Integrity and Compliance, Office of General Counsel, Office of Professional Responsibility, and Office of Inspector General will all share responsibility for compliance.

Implementation:

- The FBI will implement the new AGG with a detailed manual that clearly spells out what activities are authorized under what circumstances, what levels of approval and notifications are required for each type of justification and investigative method, time limits on activities, information sharing, and record keeping.

- To ensure the new policy framework works for all investigative programs, the drafting team includes managers from field offices and headquarters operational divisions, as well as attorneys from the Office of General Counsel, personnel from the Corporate Policy Office. The AGG Task Force seeks input from each operation program through division policy officers and attempts to reach consensus on the standardized rules to be included. The team is also seeking input from civil liberties groups.

- An aggressive training and communications strategy is planned to educate the workforce, including: mandatory web-based training, town hall, user friendly reference materials, communications tools kits for managers and Chief Division Counsels, and updates to the New Agents and Analysts training curriculum as well as other in-service training.

- Additionally, personnel will be able to easily locate and identify the applicable policy for a given situation through an indexed and searchable web-based portal on the FBI intranet – reducing the likelihood of personnel relying on an outdated policy.

DE GEOMAP-1579

EXHIBIT B

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 15, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on March 25, 2009. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." We hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Jeff Sessions
Ranking Minority Member

DE GEOMAP-1580

Outside the Scope

[redacted]

9. You agreed with me at a hearing in September 2008 and I assume you still do now, that it would be counterproductive for the FBI to engage in racial profiling in national security investigations. Yet, the Guidelines permit the use of race as a factor in determining whether an assessment will be undertaken. And the FBI General Counsel's December letter to Senator Leahy concerning implementation of the Guidelines makes it clear that is the case. How can you be sure that racial profiling, which you told me in September would be counterproductive and wrong, is not taking place?

Response:

The FBI will not engage in racial profiling in either criminal or national security matters; the letter from the FBI's General Counsel to Senator Leahy did not state otherwise.

Racial profiling, or the invidious use of race or ethnicity as the basis for targeting suspects or conducting stops, searches, seizures and other law enforcement investigative procedures, has no place in law enforcement. It is an unconstitutional, ineffective and unproductive law enforcement tool. The FBI does not engage in racial profiling in either criminal or national security matters. Federal law enforcement officers may consider race and ethnicity in conducting activities in connection with a specific investigation or assessment, however, to the extent that there is trustworthy information, relevant to the locality, time frame or assessment, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, organization or activity.

[redacted]

Outside the Scope

Response:

[redacted]

DE GEOMAP-1581

Exhibit 2

ENTERED
CLERK, U.S. DISTRICT COURT

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Attorneys for Defendant
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FILED
APR 28 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD LEE BEAUMAN, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	No. CV 92-7603-AWT(JRx)
	DATE: April 12, 1993
	TIME: 10:00 a.m.

DEFENDANT'S SUPPLEMENTAL PROPOSED CONCLUSION OF LAW

In response to the plaintiff's assertion of a (c)(1) exclusion, the defendant hereby submits to the Court a supplemental proposed conclusion of law which is respectfully requested to be considered in addition to the proposed findings of fact and conclusions of law previously lodged with the Court:

"The plaintiff argues that if he had been the subject of an investigation, 5 U.S.C. § 552(c)(1)(B) would prevent the discovery of the investigation by the requester. The (c)(1) exclusion authorizes an agency to treat certain types of records as not subject to the requirements of FOIA where the investigation or proceeding involves a possible violation of criminal law and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency and that disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings. In response to the plaintiff's claim of the (c)(1) exclusion being utilized in this action, the defendant has submitted to the Court, for its in camera inspection the Declaration of Linda Kloss, which addresses the (c)(1) exclusion claim raised by the plaintiff. The Court has fully reviewed the in camera Kloss Declaration and the (c)(1) exclusion claim of the plaintiff. Without confirming or denying that any such exclusion was actually invoked by the defendant, the Court finds and concludes that if an exclusion was in fact employed, it was, and remains, amply justified."

PRESENTED BY:

TERRENCE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

JAN L. LUYMES
Assistant United States Attorney
Senior Litigation Counsel
Attorneys for Defendant

IT IS SO ORDERED.

DATED APR 28 1993

A. MARIANNE NARA

UNITED STATES DISTRICT JUDGE

FILE COPY

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CLERK, U.S. DISTRICT COURT
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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD LEE BEAUMAN, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	NO. CV 92-7603-AWT DATE: April 12, 1993 TIME: 10:00 a.m.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

The defendant's Motion to Dismiss and/or for Summary Judgment came on for hearing on April 12, 1993 at 10:00 a.m. in the above-entitled Court before the Honorable A. Wallace Tashima, United States District Judge. After a thorough consideration of the pleadings, the memoranda, the declarations and exhibits filed by the parties with respect to the Motion and oral argument, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff is Ronald Lee Beauman, who represents himself.

2. The plaintiff has named as defendant the Federal Bureau of Investigation.

3. Plaintiff has brought the action pursuant to the Freedom of Information Act ("FOIA"), 5. U.S.C. § 552. The plaintiff seeks to enjoin the defendant from withholding records allegedly requested by the plaintiff pursuant to the FOIA, and requiring the defendant to produce records allegedly improperly withheld from the requester.

4. By letter dated May 5, 1992, Ronald Lee Beauman made a FOIA request to FBI Headquarters ("FBIHQ") for "any information the Washington, D.C. division of the FBI has concerning me". Mr. Beauman provided certain personal identifying information. Mr. Beauman indicated he was particularly interested in investigations allegedly conducted by the FBI where Mr. Beauman believed he was identified as a suspect in any criminal action by four companies.

5. By letter dated May 18, 1992, FBIHQ responded to plaintiff's request, advising him that no records responsive to his request had been located by a search of the automated indices to the Central Records System files at FBI. He was advised that the automated indices was limited to records within a specific time frame and was further advised that, if he believed responsive records were created prior to these dates, he should request another search.

6. Plaintiff made another FOIA request to the FBI by letter dated August 14, 1992, again requesting "any information the Washington, D.C. division of the FBI has concerning me". Mr. Beauman again asserted that criminal allegations had been filed with the FBI and wished to be placed in contact with the agents in charge of the alleged investigations. The second FOIA request gave no time parameters for the search.

7. In response to this second FOIA request, FBIHQ acknowledged receipt of the request and advised that a search was being conducted of the indices to the central records system files. The FBI subsequently responded by letter dated October 7, 1992 and advised the plaintiff that no records responsive to his request were located other than the correspondence regarding his prior request.

8. By letter dated October 7, 1992, the plaintiff filed an administrative appeal with the Department of Justice concerning his August 14, 1992 request.

9. By letter dated December 16, 1992, the Office of Information and Privacy within the Department of Justice affirmed the FBIHQ's determination that no records responsive to the plaintiff's request could be located in the indices of its central records system.

10. Thereafter, the plaintiff filed his action.

11. The Central Records System utilized by the FBI at its Headquarters enables the FBI to maintain all pertinent information in the possession of the FBI which has been acquired in the course of fulfilling its law enforcement responsibilities. The records maintained in this Central Records System consist of

administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. The system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter. The Central Records System is the place where responsive records would be reasonably expected to be located if they exist.

12. Access to the Central Records System at FBI Headquarters is afforded by the General Indices which are arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals. Searches are made of this index in order to locate records concerning a particular subject. An index reference falls into two general categories: the "main" index reference and the "cross-reference" index reference. A "main" index reference carries the name of an individual, organization, activity or the like, which is the main subject of a file maintained in the system. A "cross-reference" index reference contains only a mention or reference to an individual or organization which is located in a file concerning the investigation of another individual, organization, or event.

13. The decision to index is made by the investigative FBI Agent or supervisor in the field and the supervising FBI Agent at FBI Headquarters, except for the names of subject(s), suspect(s), or victim(s) carried in a case caption which are automatically indexed.

14. The use of the General Indices is the method reasonably expected to access records in the Central Records Systems.

15. In response to plaintiff's requests fto FBIHQ, a search of the General Indices (which contain both the main references and cross or see references) of the Central Records System at FBIHQ was conducted, using both automated and manual access procedures for documents concerning "Ronald Lee Beauman". No responsive records were located other than the correspondence relating to the plaintiff's FOIA requests.

16. In support of its motion to dismiss and/or for summary judgment, the defendant has relied upon the Declaration of Linda L. Kloss and the exhibits attached thereto.

17. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. This Court generally has jurisdiction over this action pursuant to 5 U.S.C. § 552.

2. The waiver of sovereign immunity under the Freedom of Information Act permits the Court to have jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. 5 U.S.C. Section 552(a)(4)(B). See Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 139, 150, 100 S.Ct. 960, 63 L.Ed.2d 267, 274, 281 (1980). Thus this Court has no jurisdiction over agency records not withheld, or documents not improperly withheld. Id.

3. In order to meet its obligations under FOIA, an agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements. Miller v.

United States Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985), citing National Cable Television Ass'n, Inc. v. Federal Communications Commission, 479 F.2d 183, 186 (D.C.Cir. 1973).

4. An agency is under a duty to conduct a "reasonable" search for responsive records. See e.g. Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C.Cir. 1990); Weisberg v. Department of Justice, 705 F.2d 1344, 1351 (D.C.Cir. 1983). "The adequacy of an agency's search for requested documents is judged by a standard of reasonableness, i.e. 'the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.' Weisberg, 705 F.2d at 1351. But the search need only be reasonable; it does not have to be exhaustive. See, e.g., Shaw v. U.S. Department of State, 559 F.Supp. 1053, 1057 (D.C.C. 1983)." Miller, supra, 779 F.2d at 1383.

5. The adequacy of the search is "dependent upon the circumstances of the case". Truitt v. Department of State, 897 F.2d 540, 542, n.11 (D.C. Cir. 1990); Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984); Founding Church of Scientology v. NSA, 610 F.2d 824, 834 (D.C.Cir. 1979).

6. An agency is required only to make reasonable efforts to find responsive materials. The agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Department of the Army, 920 F.2d at 68. It is not required to "reorganize its filing system in response to a request", nor to search every document in its possession. Goland v. CIA, 607 F.2d 357, 369-70

(D.C. Cir. 1979), (supp. opin.), cert. denied, 445 U.S. 927 (1980).

7. "The issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." Weisberg v. Department of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original). See also Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C.Cir. 1986) ("a search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error"); Fitzgibbon v. Secret Service, 747 F.Supp. 51, 54 (D.D.C. 1990) (paucity of documents produced held to be "of no legal consequence" where search is shown to be reasonable.) Thus, the Court concludes that whether or not any pages were retrieved is of no legal consequence.

8. With regard to a motion for summary judgment where the issue is the lack of responsive documents, the standard is that for examining the adequacy of the search. To meet its burden to show that no genuine issue of material fact exists, the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents. Weisberg v. U.S. Department of Justice, 745 F.2d at 1485.

9. When the pleadings, supplemented by affidavits or declarations, show no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law, summary judgment should be granted. Bieghler v. Kleppe, 633 F.2d 531, 532-33 (9th Cir. 1980); Perry v. Block, 684 F.2d 121, 126 (D.C.Cir. 1982). In FOIA suits, to be entitled to summary

judgment, the agency must prove that each document was produced, was not withheld, is unidentifiable, or is exempt from disclosure. Weisberg v. United States Department of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980); Kissinger, supra, 445 U.S. 136 at 150, 63 L. Ed.2d 267 at 281.

10. An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith. Weisberg v. Department of Justice, 745 F.2d at 1485; Miller, supra, 779 F.2d at 1383, citing Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C.Cir. 1979), (per curiam), cert. denied 445 U.S. 927 (1980). See also, Pollack v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); Weisberg v. Department of Justice, 705 F.2d at 1351; Perry v. Block, 684 F.2d 121, 127 (D.C.Cir 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA"). Courts do not require "with meticulous documentation the details of an epic search". Perry v. Block, 684 F.2d at 127. Non-conclusory affidavits explaining in reasonable detail the scope and method of the search conducted by the agency and submitted in good faith should suffice to demonstrate adequacy of the search. See e.g. Perry v. Block, supra,; Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. 1979). In assessing the agency's claim, its supporting documentation deserves "substantial weight". Lesar v. Department of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980).

11. Agency affidavits must show that the search method was reasonably calculated to uncover all relevant documents and must identify the terms searched or explain how the search was conducted. Oglesby v. Department of the Army, 920 F.2d at 68.

12. This Court concurs with the decision of other courts which have held that the FBI's search of its indices has been deemed "reasonable" where it has searched through "main files" (where the subject of the request was the subject of the file) and "cross" or "see references" (where the subject of the request was merely mentioned in a file in which another individual or organization was the subject). See Lawyers Comm. for Human Rights v. INS, 721 F.Supp. 552, 567 n. 12 (S.D.N.Y. 1989) (and cases cited therein); Friedman v. FBI, 605 F.Supp. 306, 311 (N.D.Ga. 1981). Stern v. U.S. Dep't of Justice, Civil No. 77-3812-C, slip op. at 5-7 (D.D.C. August 25, 1980) (duties imposed upon the FBI by the FOIA are satisfied by a search of its general indices). Thus, the Court finds and concludes that the FBI's use of its indices of its main files and cross-references in searching the FBI's Central Records System at FBI Headquarters was reasonably calculated to recover all relevant documents.

13. The Court concludes that the FBI's search for the term Ronald Lee Beauman was reasonably calculated to recover the documents requested by the requester.

14. The Court notes in passing that had criminal allegations against the plaintiff been received by the FBI, Mr. Beauman's name would have been automatically indexed as a suspect or subject in accordance with the FBI's standard indexing procedures.

15. After examining the Kloss declaration, the Court concludes that the Kloss declaration describes in sufficient, appropriate nonconclusory detail the term which was searched using methods which have been held to be reasonably expected to produce the information requested. The Kloss declaration sets forth the results of that search.

16. "But once the agency has shown by convincing evidence that its search was reasonable, i.e., that it was especially geared to recover the documents requested, then the burden is on the requester to rebut that evidence by a showing that the search was not in fact in good faith." Miller, 779 F.2d 1383. "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Oglesby v. Department of the Army, 920 F.2d at 67 n.13 (adequacy of agency's search not undercut by requestor's speculative claim that other records "must exist" due to perceived importance of subject matter). The fact that plaintiff received fewer documents that he anticipated does not demonstrate that a search was unreasonable. Fitzgibbon v. Secret Service, 747 F.Supp. at 54 . Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents". Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981)

17. After considering and rejecting the plaintiff's opposition, the Court concludes that the agency conducted a search reasonably calculated to uncover records responsive to the

plaintiff's May 18, 1992 and August 14, 1992 FOIA requests. The FBI acted in good faith.

18. In accordance with the above findings of fact and conclusions of law, the Court holds that the defendant made a reasonable search pertaining to plaintiff's FOIA requests. As there are no responsive documents, judgment is therefore entered in favor the defendant.

23. Any Finding of Fact which is a Conclusion of Law is hereby incorporated herein by reference.

DATED: This _____ day of APR 28 1993, 1993.

A. WALLACE TASHIMA

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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Assistant United States Attorney
Chief, Civil Division

Jan L. Luymes

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FILED
APR 28 1993
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APR 2 1993
CENTRAL DISTRICT OF CALIFORNIA

CONSTITUTES NOTICE OF ENTRY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD LEE BEAUMAN, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	NO. CV 92-7603-AWT ~~(Proposed)~~ JUDGMENT

The Motion to Dismiss and/or for Summary Judgment brought by defendant Federal Bureau of Investigation came on for hearing before the Honorable A. Wallace Tashima, United States District Judge, on April 12, 1992 at 10:00 a.m. The Court, having considered the pleadings filed herein, the declaration and exhibits attached thereto, moving papers and accompanying documents, and the oral arguments of the parties, and in accordance with the Findings of Facts and Conclusions of Law filed herein:

HEREBY ORDERS, ADJUDGES AND DECREES that judgment is entered in favor of defendant Federal Bureau of Investigation and against

the plaintiff on all claims in plaintiff's complaint, and plaintiff's action against defendant Federal Bureau of Investigation is dismissed with prejudice.

DATED: This _____ day of APR 29 1993, 1993.

A. WALLACE TASHIMA
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

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